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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 770

I. B. ADELMAN,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., a New York corporation, PARAMOUNT FILM DISTRIBUTING CORPORATION, a Delaware corporation, LOEW'S INCORPORATED, a Delaware corporation, RADIO-KEITH-ORPHEUM CORPORATION, a Delaware corporation, RKO RADIO PICTURES, INC., a Delaware corporation, WARNER BROS. PICTURES, INC., a Delaware corporation, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, a New York corporation, TWENTIETH CENTURY-FOX FILM CORPORATION, a New York corporation, COLUMBIA PICTURES CORPORATION, a New York corporation, UNITED ARTISTS CORPORATION, a Delaware corporation, UNIVERSAL PICTURES COMPANY, INC., a Delaware corporation, UNIVERSAL FILM EXCHANGES, INC., a Delaware corporation, INTERSTATE CIRCUIT, INC., a Delaware corporation, and TEXAS CONSOLIDATED THEATRES, INC., a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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I. B. Adelman, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on December 8, 1961.

OPINIONS BELOW.

The opinion (R. 230-51) of the United States District Court for the Southern District of Texas, Houston Division, is reported at 182 F. Supp. 217.

The opinion of the Court of Appeals is not yet reported but is printed in an appendix hereto, *infra*, pp. 13-15.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 8, 1961. It is printed in an appendix hereto, *infra*, p. 16. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether respondent exhibitors, who were found to have monopolized the first run exhibition business in violation of §§ 1 and 2 of the Sherman Act, are entitled to be protected by court decree from petitioner's first run competition?

2. Whether the defenses of *res judicata* and estoppel can be invoked to defeat a petition for modification of an antitrust decree, the provisions of which are contrary to the public policy of the antitrust laws?

3. Whether petitioner who won his antitrust suit but was granted only part of the injunctive relief he sought is barred from later seeking like relief despite changed circumstances rendering the original decree inadequate?

STATUTE INVOLVED.

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, providing in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. * * *"

STATEMENT OF THE CASE.

This case involves an attempt by petitioner to modify a decree entered in a civil suit under the antitrust laws in which petitioner was the plaintiff and successful party. The trial court dismissed the petition to modify on the grounds that the relief sought was barred by *res judicata* and estoppel. The court below affirmed.

Petitioner, L. B. Adelman, owns and operates the Delman Theatre in Houston, Texas. Respondents are distributors and exhibitors of motion pictures.

In 1948, petitioner brought an action under the federal antitrust laws for treble damages and injunctive relief. The complaint alleged that respondents had conspired to monopolize and had a monopoly of the first and second run exhibition business in the City of Houston. It was alleged that by reason of the conspiracy, petitioner's Delman was unable to license films of respondent-distributors on either an exclusive first or second run (R. 8-46).

The case was tried in 1955 before a jury and a verdict returned in petitioner's favor in the amount of $20,000. Judgment was entered on the jury verdict in the trebled

amount of $60,000, together with attorneys' fees and costs (R. 67).

Following the trial, the trial judge, the late Lamar Cecil, held a further hearing on the question of equitable relief, at the conclusion of which he entered findings of fact, conclusions of law and a final decree.

The court found that petitioner's Delman had been offered only limited opportunity to compete for films with Interstate's first run theatres (the Metropolitan, Majestic and Kirby) and that such restricted competition "has prevented the plaintiff from offering substantial competition to Interstate in either the first-run or second-run exhibition business in Houston *and is a result of the conspiracy to monopolize said first-run and second-run exhibition business found by the jury in this case*" (Finding 18, R. 64-5; emphasis supplied).

The court also found that the Delman had been given no opportunity to compete with Loew's State (the only other first run theatre) for first run films (Finding 13, R. 63).

Judge Cecil then found as a matter of law:

> "The defendants have been found by the jury verdict in this case to have violated Sections 1 and 2 of the Sherman Act *by conspiring with each other to monopolize the first-run and second-run exhibition of films in Houston, Texas*" (Conclusion of Law 1, R. 66; emphasis supplied).

At the time of the hearing on equitable relief, there were four theatres in Houston operating on a regular first run policy.* These were Loew's State and Interstate's Metropolitan, Majestic and Kirby. Petitioner asked that a decree be entered enjoining respondent distributors from denying petitioner an equal opportunity to compete for any exclusive first run offered in Houston. This relief was only allowed in part.

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* A fifth theatre, Interstate's River Oaks, operated on a first run "art" policy (Finding 8; R. 62-3).

The decree, after enjoining defendants from conspiring "to monopolize the first-run or second-run exhibition business in the City of Houston, Texas", enjoined defendants from:

> "3 " " A. Denying to the plaintiff an equal opportunity with the exhibitor defendants, Paramount Pictures, Inc., Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. and Loew's Incorporated, to compete for an exclusive first-run of any feature film offered in Houston, Texas, except such films as may be licensed for first-run exhibition in the Loew's State, Metropolitan, or Majestic Theatres" (R. 68).

The decree thus gave the Delman an opportunity to compete with the Kirby for an exclusive first run on films offered that theatre, but there was no requirement that distributors permit the Delman to compete for films offered exhibitors' other three theatres.

No appeal was taken from the monetary judgment or final decree.

Subsequent to the entry of the decree, in April, 1956, Interstate closed the Kirby. That theatre has remained closed since that date. The only three theatres presently operating on a first run policy are the State, Metropolitan and Majestic (R. 98).

In May, 1958, petitioner filed a petition to modify the decree to permit the Delman to compete for films offered these three theatres. The petition alleged that since the closing of the Kirby, the Delman had been cut off from any access to first run films since films formerly available to the Kirby (and petitioner) are now absorbed by the State, Metropolitan and Majestic, against whom the Delman is afforded no opportunity to bid or compete (R. 98).

The petition alleged that the decree not only had failed to provide effective relief but was being used to protect

and preserve exhibitor respondents' first run monopoly (R. 100).

Respondents moved to dismiss the petition on the basis of the defenses of *res judicata* and estoppel, contending that the petition was barred since the same relief had been previously requested and denied at the original hearing before Judge Cecil (R. 234).

Judge Ingraham granted the motion and dismissed the petition on the legal defenses asserted without permitting any evidence to be offered (R. 233-4). Judge Ingraham said (R. 242-3):

> "The record in this case is clear. At every juncture plaintiff contended that he should be accorded the right to compete against the Loew's State, Metropolitan and Majestic Theatres. At every juncture he lost. From his defeat he took no appeal. He now proposes that the prior adjudication be disregarded and that he be accorded the relief heretofore specifically denied. But the prior adjudication is binding on plaintiff."

The Court of Appeals affirmed on the same grounds.*

* The Court of Appeals added however that "it was expressly determined that * * * [the Delman] was not in competition with appellees' Loew's State, Metropolitan or Majestic Theatres" despite Judge Cecil's findings and respondents' admission to the contrary. Exhibitor respondents, in their brief in the court below, said (p. 9): "The statement that the appellees base their position (that appellant is not entitled to an injunction guaranteeing his Delman the right to compete against the three downtown houses) upon the lack of substantial competition between the theatres is not correct; * * * There was and is competition between the downtown houses exhibiting first run films and all theatres in Houston including the Delman * * *"

REASONS FOR GRANTING THE WRIT.

I.

THE HOLDING OF THE COURT OF APPEALS THAT THE PETITION IS BARRED BY RES JUDICATA AND ESTOPPEL IS CONTRARY TO THE PUBLIC POLICY OF THE ANTITRUST LAWS.

The trial court and the court below, in dismissing the petition, held that since the same relief sought was denied at the original hearing on injunctive relief and no appeal was taken, petitioner is permanently barred from seeking this same relief, regardless of changed circumstances claimed to have rendered the decree inadequate.

The holding conflicts in principle with this Court's decision in *United States* v. *Swift & Co.*, 286 U. S. 106, 114-5, 76 L. Ed. 999, 1005-6, that "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need," and "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

At the time Judge Cecil entered the original decree, there were four first run theatres in Houston. The decree assured the Delman of the right to compete for first run films offered the Kirby. As long as the Kirby continued to operate on a first run, the Delman had access to one-fourth of distributors' first run films. The decree did not give petitioner unlimited access to first run product, but it provided tentative and partial relief in this direction. When Interstate closed the Kirby, petitioner's source of first run

films was cut off. Pictures formerly available to the Kirby (and petitioner) are now absorbed by the State, Metropolitan and Majestic Theatres.

The petition alleged, and respondents by their motions to dismiss admitted, that since the Kirby closed, petitioner has been afforded "no opportunity at all to bid against or compete with any downtown first run theatre" for first run films (R. 98).

It is apparent that the closing of the Kirby was a changed circumstance which made appropriate a reconsideration of the efficacy of the present decree.

Nevertheless, the Court of Appeals has announced the novel doctrine that because the successful plaintiff in an antitrust case did not get all the relief he asked for at the initial hearing, and did not appeal the decree, he is forever barred from seeking that relief which was denied. We submit that such a ruling puts court decrees in a strait jacket and places the interest of the public in decrees which effectively redress proven violations of the antitrust laws "at the mercy" of the parties.

This Court has held that the defense of *res judicata* cannot be invoked to defeat the public policy of the antitrust laws. In *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U. S. 661, 669-70, 88 L. Ed. 376, 383, in holding that the defense of *res judicata* would not bar a misuse defense to a patent infringement suit, the Court said:

> "* * * it does not follow that the doctrine of *res judicata* forecloses the defense which is tendered.
>
> "Respondents ask the equity court for an injunction against infringement by petitioner of the patent in question and for an accounting. Should such a decree be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws."

Here, by permitting the defenses of *res judicata* and estoppel, the Court of Appeals has in effect placed its imprimatur on exhibitor respondents' first run monopoly. Respondent distributors rely on and assert the decree as grounds for refusing to permit the Delman to compete for films offered to exhibitors' Big Three theatres. Not only is this an anomalous result where petitioner won his antitrust case, but it is contrary to the antitrust laws and the public interest.

This Court, in *International Salt Co. v. United States*, 332 U. S. 392, 401, 92 L. Ed. 20, 28 said that the public interest served by civil suits under the antitrust laws is that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." The holding of the court below achieves just the contrary result.

II.

THE HOLDING OF THE COURT OF APPEALS PROTECTS EXHIBITOR RESPONDENTS FROM PETITIONER'S FIRST RUN COMPETITION AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Under the terms of the decree and the holding of the court below, petitioner's Delman is prevented from competing with exhibitor respondents' three first run theatres. Respondent distributors offer their top pictures first to these theatres and it is only pictures which they reject that petitioner has an opportunity to license on a first run. Thus, these theatres are in effect given a right of first refusal.

Certainly exhibitor respondents have no vested right to a particular playing position and they are not entitled to be protected by court decree from petitioner's first run competition.

The holding of the court below that petitioner's Delman is not entitled to compete with Loew's State, the Metropolitan and Majestic Theatres conflicts in principle with the decisions of the Seventh Circuit in *Bigelow* v. *RKO-Radio Pictures, et al.*, 162 F. 2d 520, and *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561. These were both movie antitrust cases and the defendants had been found guilty of a conspiracy to monopolize first run and to prefer affiliated theatres in violation of the antitrust laws. The Seventh Circuit held that plaintiffs were not entitled to be protected by court decree in a preferred playing position or run and struck provisions from the decree which would have required distributors to offer films first to plaintiffs' theatres. Thus, in *Bigelow*, the court said (p. 524):

> "* * * It has been the plaintiffs' contention, as we understand it, that no one has a vested right in a playing position. In this we agree with the plaintiffs. *The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position*" (emphasis supplied).

And, later, in *Milwaukee Towne*, the same court said (p. 571):

> "* * * we think that plaintiff is entitled to a decree which will place it only in the same competitive position which it would have occupied absent a conspiracy. The plaintiff has no right to the award of a position superior to that of other competitors."

A fortiorari, if the successful plaintiff is not entitled to be protected by decree from the competition of his competitors, respondents, who were found to have an illegal monopoly, are entitled to no better treatment. Here, however, the decree not only denies petitioner equality of opportunity but any opportunity at all to compete for first run pictures.

CONCLUSION.

The point that should not escape notice of this Court is that respondents, by the simple device of closing the Kirby Theatre, have walked out from under Judge Cecil's decree and, at the same time, have cut off petitioner's source of first run pictures. Thus petitioner, having won the conspiracy issues in the case and having obtained partial relief from respondents' first run monopoly, is now faced with a decree which bars him from competing as a first run theatre and affords exhibitor respondents an absolute monopoly of first run exhibition in Houston. It is difficult to conceive a more incongruous result.

The private action under the antitrust laws is an important supplement to governmental enforcement of those laws and the remedial phase of such actions, more so than damages, is of obvious public importance. The successful plaintiff and the public are entitled to a decree which effectively redresses proven violation of the antitrust laws and denies to the wrongdoers the fruits of their illegal conspiracy. The holding of the court below does violence to both these principles.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 18484.

L. B. ADELMAN,
Appellant.

versus

PARAMOUNT PICTURES, INC., ET AL.,
Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS.

December 8, 1961.

Before TUTTLE, *Chief Judge*, and HUTCHESON and JONES, *Circuit Judges*.

JONES, *Circuit Judge*: This appeal might well be disposed of by a reference to the opinion of the district court in which the facts are distinctly set forth and the applicable law is clearly stated. *Adelman v. Paramount Pictures, Inc.*, 182 F. Supp. 217. The judgment of the district court is affirmed. A few observations on our part may be appropriate.

This suit was brought in 1948 by the appellant, L. B. Adelman, the owner of the Delman Theatre in Houston,

Texas, seeking an injunction to allow him to compete with specifically designated theatres which were operated by appellees for first run feature films. It was contended by the appellant that he was entitled to compete with all theatres in Houston operated by appellees. It was expressly determined that he was not in competition with appellees' Loew's State, Metropolitan or Majestic Theatres. It was held that he was entitled to compete with appellees' Kirby and River Oaks Theatres, and a judgment was entered on September 16, 1955, enjoining the appellees from denying the appellant an equal opportunity to compete for the first run of feature film in Houston except such as might be licensed for first run exhibition at Loew's State, Metropolitan or Majestic Theatres. There were two other first run theatres in Houston operated by appellees, the Kirby and the River Oaks. The Kirby was a downtown theatre; the River Oaks was not. There was no appeal from the judgment.

Subsequent to the entry of the injunction the Kirby ceased to operate as a first run theatre. In 1958 the appellant filed a petition for the modification of the injunction by giving him an opportunity to compete with the Loew's State, Metropolitan and Majestic Theatres. The district court, as appears in its opinion, concluded that the principles of estoppel and res judicata were controlling as against the appellant and dismissed the petition to modify.

The district court, having retained jurisdiction, could entertain a petition for the modification of the injunction, and it could no doubt have exercised such jurisdiction even though it had not been expressly reserved. *United States* v. *Swift & Co.*, 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999. It does not follow, however, that issues which have been submitted to the court and have been decided by it may be relitigated upon an application for modification. A review of the determination of such issues and the correction of an

erroneous decision may be accomplished by the established appellate procedures. 28 Am. Jur. 832, Injunctions § 319, Restatement, Judgments § 46; 6 Toumlin Anti-Trust Laws 580 § 18.17. Since it was expressly decided on the original application for an injunction that the appellant's Delman Theatre was not in competition with appellees' Loew's State, Metropolitan and Majestic Theatres, and no subsequently occurring fact is asserted as establishing the contrary of that determination, any modification of the injunction such as is now sought would be a reversal of the determination of an issue decided by the court and accepted by the appellant.

The district court's judgment is

AFFIRMED.

JUDGMENT.

Extract from the Minutes of December 8, 1961.

No. 18484.

I. B. ADELMAN,
Appellant.

versus

PARAMOUNT PICTURES, INC., ET AL.,
Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, I. B. Adelman, and the surety on the appeal bond herein, National Standard Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.